REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 88 OF 2011

ARMSTRONG KISUYA……..……..…APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 3696 of 2010 Republic v Armstrong Kisuya in the Resident Magistrates Court at Eldoret by J. Awiti, Resident Magistrate dated 20th May 2011)

JUDGMENT

1. The appellant was convicted for causing grievous harm to the complainant contrary to section 234 of the Penal Code. He was sentenced to five years imprisonment.

2. The particulars were that on the 4th June 2010 at Kona Ndogo, Kapsoya Trading Centre, in Eldoret East District within the Rift Valley Province, jointly with another person not before the court, he unlawfully caused grievous harm to Karbino Awad Peka.

3. The appellant has appealed against his conviction and sentence. There are nine grounds of appeal. They can be condensed into six. First, that the ingredients of the offence were not proved beyond reasonable doubt; secondly, that vital witnesses were not called to the stand to "corroborate the evidence of eye witnesses"; thirdly, that the defence tendered by the appellant was not taken into account; fourthly, that the trial court disregarded the appellant's mitigation; fifthly, that the sentence was harsh and excessive; and, sixthly, that the appellant was not afforded proper legal representation.

4. At the hearing of the appeal, the appellant made brief oral submissions. He protested his innocence; and, said that the jail sentence forced him to abandon his education. He pleaded for clemency.

5. The State contests the appeal. In a nutshell, the case for the State is that the charge was proved beyond reasonable doubt; that the appellant was positively identified; that the evidence of the complainant was corroborated by PW3 and PW4; and, that the injuries to the complainant led to permanent disability. Regarding the sentence, the State submitted that the lower court considered the mitigation tendered; and, that the sentence was appropriate in the circumstances. I was accordingly urged to dismiss the appeal.

6. This is a first appeal to the High Court. I am required to re-evaluate all the evidence on record and to draw my own conclusions. In doing so, I have been very cautious because I neither saw nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v*

Republic [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.

7. PW1 was the complainant. He *knew* the appellant since the year 2006. They were both footballers and their respective teams used to meet at Kapsoya. On 4th June 2006 PW1 was at Kona Ndogo. He was in the company of Mark (PW3) and Acigark (PW4). On their way home at 8:00pm, along some bend in the road, the appellant and other persons blocked them. The appellant was armed with a piece of timber. The other persons were not armed. A fight ensued. A person held his hands at the back. The appellant then hit PW1 with the piece of timber on the head and left eye.

8. The impact damaged his optic nerve. The eye is blind. He was treated by Dr. Adede who also referred him to Kikuyu Hospital. He was issued with a P3 form by PW6 Police Constable Adenai, the investigating officer. PW1 produced a P3 form (exhibit 1). When cross-examined by the appellant, he conceded he had been to a bar but had not taken alcohol. He could not tell whether the appellant was drunk. He said he was at a loss why the appellant attacked him.

9. That narrative was largely confirmed by PW3 and PW4. PW3 had *known* the appellant for about a week before the incident. PW4 also *knew* the appellant. He said the appellant's father taught him in primary school. The two witnesses confirmed that it was the appellant who had a wooden stick or timber and they saw him hit the complainant on the head. The complainant fell down. He was bleeding. They took him to Moi Teaching and Referral Hospital. PW4 said that prior to the incident a dispute had arisen between the Sudanese residing at Kona Ndogo and Kenya Re Estates.

10. PW2 was a senior medical officer at Huruma Sub-District Hospital. He filled the P3 form (exhibit 1) on 20th June 2010, sixteen days after the incident. There was a second P3 form signed on 7th March 2011 (exhibit 3). He reviewed some medical notes from Moi Teaching and Referral Hospital. He testified that the complainant sustained injuries on the forearms, cut wound between the eyes and conjectural haemorrhage. The left eye was damaged and could not see at all. He classified the degree of injury as *grievous harm*.

11. According to the P3 form (exhibit 1), the complainant's left eye had corneal opacity and vitreal opacity (blunt eye). The complainant also suffered swollen and tender forehead, cheeks and wrists as well as a cut wound between the eyes. He was stitched and dressed; and, given antibiotics and analgesics. The cause of the injury was a *blunt object*.

12. PW5 was Dr. Odede. He examined the appellant on 10th June 2010. The cornea was hazy, the anterior chamber had blood, the intra-ocular pressure was raised; and, the eye had lost vision. He said the patient suffered 30% permanent disability on the left eye. He produced his report (exhbit 2).

13. I have then examined the defence proffered by the appellant. He denied committing the offence. He said he is a casual labourer. On 4th June 2010, he was inside the bar heading to the pool area. He said he found the complainant and his friends outside a bar. He found them fighting. He had responded to a distress call. He found PW1 fighting with Benjamin. He said he held Benjamin and pushed him aside. He helped PW1 to get up. The people who were beating up the complainant then left the scene. The appellant testified that the person who was to be his witness was compromised by the complainant not to testify. He said he was arrested together with another person who was released on grounds of insanity. He denied that he went at large or tried to escape to Uganda. He said he could not abandon his family in Kenya. He claimed he was unfairly implicated in the matter. Although the appellant was granted time to call a witness, he failed to do so.

14. From that evidence, it is obvious that the complainant and the appellant were *not* complete strangers. He knew the appellant since the year 2006. They were both footballers and their respective teams used to meet at Kapsoya. PW3 and PW4 also *knew* the appellant. PW3 had known the appellant for about a week before the incident. PW4 said the appellant's father taught him in primary school. The offence took place at about 8:00 pm. It was obviously dark. There were a number of people involved in the fight. As the combat was close; and, they knew each other, I entertain no doubt that the complainant identified the appellant. That was well corroborated by PW3 and PW4 who confirmed that it was the appellant who had

a wooden stick or timber. They *saw* him hit the complainant on the head with it.

15. In *Wamunga v Republic* [1989] KLR 424**,** the Court of Appeal held as follows-

> *"It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction."*

16. In *Republic v Turnbull & others* [1976] 3 All ER 549, the court held that mistakes can be made even in cases of recognition; and that an honest witness may nonetheless be mistaken. In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal had this to say-

> *"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."*

17. I have reached the inescapable conclusion that the appellant was the person who attacked the complainant with a piece of timber. The complainant positively identified him. As I stated, they were not strangers at all. It was confirmed by PW3 and PW4. That to me is evidence of recognition; some stronger evidence than that of identification.

18. The injuries to the complainant were *corroborated* by medical evidence of PW2 and PW5. PW2 testified that the complainant sustained injuries on the forearms, cut wound between the eyes and conjectural haemorrhage. The left eye was damaged and could not see at all. He classified the degree of injury as grievous harm. Dr. Odede (PW5) on the other hand confirmed that the cornea of the left eye was hazy, the anterior chamber had blood, the intra-ocular pressure was raised; and, the eye had lost vision. He said the patient suffered 30% permanent disability on the left eye. The injuries were caused by a *blunt object*. That supports the evidence that the appellant hit the complainant with a piece of wood. The injuries amounted to *grievous harm.*

19. I have also considered the evidence of the appellant. His posture was that of an innocent bystander who intervened to help the complainant. He claimed that he was unfairly implicated in the matter. When I weigh his defence against the evidence of the complainant, PW3 and PW4, I find that it was unbelievable. He was positively identified as person who attacked the complainant with a piece of timber. The narrative by PW1, PW3 and PW4 was consistent. The witnesses corroborated one another. The appellant confirmed he was at the *locus in quo* at the time of the fight. He had a clear opportunity to commit the offence. It amounts to further corroboration. See *Opo v Republic* [1976-80] 1 KLR 1669.

20. The appellant contends that the lower court failed to afford him "proper legal representation". The nature of charge facing the appellant did not require the trial court or the State to provide him with legal assistance. I have *not* seen anything on the record to suggest that the appellant did *not* receive a *fair trial*. On 20th April 2011, the defendant testified. He was allowed an adjournment to the 29th April 2011 to call a witness. He failed to get the witness. His defence was taken into consideration. The lower court, just like this court, did not believe the appellant.

21. The appellant contends that the prosecution should have called more witnesses "to corroborate the evidence of eye witnesses". The witnesses called in this case were sufficient. I also remain alive that under section 143 of the Evidence Act, no particular number of witnesses is necessary to establish a fact. See *Joseph Njuguna Mwaura and others v Republic* Court of Appeal Criminal appeal 5 of 2008 [2013] eKLR, *Bernard Kiprotich Kamama v Republic*, High Court, Eldoret, Criminal Appeal 123 of 2010 [2013] eKLR.

22. In this case, I am satisfied that the prosecution discharged its legal burden of proof. See *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332, *Abdalla Bin Wendo and another v Republic*

(1953) EACA 166. I have reached the conclusion that the appellant attacked the complainant. The totality of the evidence proved the culpability of the appellant for the offence of causing grievous harm.

23. That takes me to the sentence. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

> *"The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may……(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or….. "*

24. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

> *"The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors. …The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirely before settling for any given sentence."*

25. The charge facing the appellant was a *felony*. Section 234 of the Penal Code provides that any person who commits grievous harm to another is guilty of a felony and is liable to imprisonment for life. The lower court considered the mitigation tendered and the fact that the appellant was a *first offender*. Considering the savage attack on the complainant; and, the permanent disability of 30% to his left eye, the sentence of five years was quite lenient.

26. The upshot is that the appeal is devoid of merit. It is hereby dismissed. It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 3rd day of March 2016

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

The appellant.

Ms. B. Oduor and Ms. Mokua for the State.

Mr. J. Kemboi, Court Clerk.